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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 84

LOUIS H. NETZER,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

A CORPORATION

PETITIONER'S REPLY BRIEF

Respondent's Authorities Are Not Analogous to the Case at Bar

Respondent cites several cases, 10 in number, to support its contention, that after a defective car is removed from the carrier's line and reaches the place of repair, the provisions of the Safety Appliance Act are inapplicable. Respondent also contends that the cases cited are controlling as to the case at bar.

This is not true as the cases are readily distinguishable. Three of the cases cited, *Sherry* v. *Baltimore & O. R. Co.*, 30 F. (2d) 487, certiorari denied 280 U. S. 55, *McCalmont* v. *Pennsylvania R. Co.*, 283 F. 736, and *Atlantic Coast Line R. Co.* v. *Edge*, 59 S. E. (2d) 533, deal with actions which arose during repairs to *known defective safety appliances,*

the cause of action being based on the defective condition of the very appliance being repaired. As stated in *Baltimore & O. R. Co.* v. *Hooven*, 297 F. 919:

> "The act of equipping the vehicles originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of the law."

With the law above stated and applied in the above cases petitioner agrees, *but* in the case at bar the petitioner was not repairing a defective appliance nor did he have knowledge that the appliance was defective.

Two of the cases cited, *Kaminski* v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 519 and *New York, C. & St. L. R. Co.* v. *Kelly*, (CCA 7th), 70 F. (2d) 548, certiorari denied 293 U. S. 595, 55 S. Ct. 110, 79 L. Ed. 689, arose as a result of a defective safety appliance on cars in a repair yard for general repairs, including repairs to the appliance of said cars. In the *Kaminski* case the repair consisted of entirely dismantling the car and practically rebuilding it.

In two of the cases cited, *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33 and *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, the Safety Appliance Act was held applicable.

The remaining three cases cited, *Lyle* v. *Atchison T. & S. F. R. Co.*, 177 F. (2d) 221, *B. & O. R. Co.* v. *Hooven*, 297 F. 919, and *Compten* v. *So. Pac. Co.*, 70 Cal. Ap. (2d) 267, are different for the reason that they involved locomotives in the roundhouse for repairs and not assigned to any particular service after the repairs had been made on them.

In none of the cases cited by respondent, did the cars remain under the original bill of lading.

In none of the cases cited did the cars remain loaded while mere running repairs were made which did not involve repairs of safety appliances.

The Provisions of the Safety Appliance Act Apply to All Cars in Use by the Railroad on Its Line; Temporary Interruptions of Travel Do Not Take Cars Out of the Scope of the Act.

In *Board of Trade of the City of Chicago et al.* v. *Olson*, 262 U. S. 1, 33, Mr. Chief Justice Taft stated:

> "The right to remove grain at Chicago for temporary purposes or storage, inspecting, weighing, grading or mixing and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. . . . does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it . . ." (See plaintiff's petition for other citations on temporary interruptions as not removing goods from interstate commerce).

A Loaded Box Car Under Original Bills of Lading on a Rip Track for Running Repairs Is In Use by the Railroad Company.

Cyc. Vol. 39, p. 846, defines "use" as follows:

> "B. As a verb. To make use of; to convert to one's own service; to avail one's self of, to employ; to put to a purpose; to accustom; to habituate; to employ, to hold, to occupy, to enjoy or take the benefit of; to make use of, to put to a purpose; to employ for the attainment of some purpose or end; to avail one's self of; to make use of; to employ for any purpose; to make use of; to convert to one's service; to avail one's self of; to employ; to put to a purpose; to make use of; to put to use; to avail one's self of; to put to a purpose; to employ for the accomplishment of a purpose; to turn to account; to make use of; to treat."

Black's Law Dictionary defines "use" as follows:

> "To make use of, to convert to one's service, to avail one's self of, to employ."

In *Moore et al.* v. *American Transportation Co.*, 65 U. S. 1, 37, 24 Howard 1, Mr. Justice Nelson, speaking for the court said:

> "The word *used* means, in the connection found, employed. . . ."

In *Astor* v. *Merritt*, 111 U. S. 202, 213, Mr. Justice Blatchford, speaking for the court, said:

> "If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year . . . . no one would hesitate to say that such wearing apparel was in 'actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use. . . . 'in use' is defined to be 'in employment'; out of use to be 'not in employment'; these definitions aid in showing that it is too narrow a construction of the word 'in actual use', as applied to this case to say that they require that the wearing apparel should have been actually worn."

In *Bastian* v. *State*, 104 Misc. 287, 175 N. Y. Supp. 564, 566, the court said:

> "The word use in this statute should have its ordinary meaning."

Petitioner respectfully submits that a box car or other railroad freight car is originally built for one purpose, that is to be loaded with goods for the purpose of carrying said goods in commerce. *When the car is thus loaded with goods, it is in use within the above definition. It remains in use or is used until the goods are unloaded.* Respondent, on page 10 of its brief, concedes that the car involved herein was "in interstate commerce because still loaded with an interstate shipment". If the car is in interstate commerce, it is certainly put to use, employed, made use of or em-

ployed for the attainment of some end or purpose by the railroad within the above definitions. It is, therefore, in use by the railroad if for no other purpose, as a temporary storage place for the interstate goods.

A Car on a Rip Track Owned by the Railroad and Controlled by the Road Which Track Is Necessary to the Operation of the Road Is on the Railroad Line.

In *Morgan's Louisiana and T. R. & S. S. Co.* v. *Aucoin,* 73 So. 859, the court defines a railroad line as follows:

> "A railroad line as I understand it, is made up of one or more main tracks, with the necessary side tracks, switches, signal blocks, and such other appurtenances as may be necessary to the operation of the railroad."

See also *Myers* v. *Reading Co.,* 331 U. S. 469; *Missouri K-T R. Co. of Texas* v. *Ridgeway,* 191 F. (2d) 363 (Reversed on other grounds); and *Byler* v. *Wabash R. Co.,* 196 F. (2d) 9, for cases in which the Safety Appliance Act was applied to cars either standing or moving in a railroad yard. Petitioner respectfully submits that to restrict the word "line" as used in the Safety Appliance Act to mean anything less inclusive than the above given definition would be to abort the purpose of the Safety Appliance Act. Most accidents involving safety appliances occur in railroad yards. Citing

Chesapeake & O. R. Co. v. *U. S.,* 249 F. 805, in which the court said:

> "The Safety Appliance Act as originally passed being remedial and humanitarian in its purpose, is broadly construed."

Construction and Application of the Act Must Be Broad and Liberal in View of Its Remedial Nature

In the case of *Schlemmer* v. *Buffalo, Rochester, & C. Ry.,* 205 U. S. 1, 10, Mr. Justice Holmes said:

> "The words 'used in moving interstate traffic' should not be taken in a narrow sense."

In speaking of an injury, the court in *St. Louis, I. M. & So. R. Co.* v. *Taylor,* 210 U. S. 281, 295, said:

> "If it must be borne entirely by he who suffers it, that is a hardship to him, if its burden is transferred, as far as it is capable of transferrence, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardships of this injury and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes instead of on those who are in the main helpless in that regard. Such a policy would be intelligible, and to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words."

In *Lilly* v. *Grand Trunk,* 317 U. S. 481, 486, the court said:

> "The purpose of the act is to protect employees and the public and it must be construed in the light of its remedial purposes."

In *Coray* v. *Southern Pacific Ry.,* 335 U. S. 520, 93 L. Ed. 208, 210, the court stated:

> "* * * and this act, fairly interpreted must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances."

See also *Chesapeake & O. R. Co.* v. *U. S., supra,* and *Fairport* v. *Meredith,* 292 U. S. 589.

Respondent notes that Section 13 of the Act exempts carriers from criminal liability while a defective car is being hauled from a place on the line to a place of repair and that no provision is made covering a defective car after it has reached the point of repair. Respondent then states that "this is indicative of the intent of Congress to exempt the carrier from the provisions of the Act after the car

has reached the place of the repair." Petitioner merely further notes that Section 13 does not apply to defective cars generally but to "hauling cars with equipment (Safety Appliance) which is discovered to be defective enroute". The section deals exclusively with cars that are discovered to have defective safety appliances. Petitioner certainly does not claim that the Safety Appliance Act applies during the time a defective safety appliance is being repaired. Such repair is in compliance with and not in violation of the law. But, by the same reasoning it cannot be said that the Safety Appliance Act does not apply during a running repair to a part of the car other than a safety appliance if by reason of a defective safety appliance an employee is injured.

The intent of Congress in passing the amendment to Section 13 is clearly expressed in report #250, Feb. 18, 1910, by Mr. Elkins of the Committee on Interstate Commerce, 61st Congress, Senate Reports, Vol. 1., Misc. 1. It will be noted that the intent of Congress was not to limit the rights of employees to recover for injuries sustained under the Safety Appliance Act. Mr. Elkins stated:

> "It is but just that the risk of working *about,* and the movement of defective equipment should be borne by the carrier."

As to the proper interpretation of the above proviso, petitioner is reminded of what Justice Storey in *U. S.* v. *Dickson,* 15 Peters U. S. 141, 163, had to say:

> "We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes; that where an enacting clause is general in its language, and object, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms."

Conclusion

Petitioner respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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FILED

IN THE

Supreme Court of the United States

October Term, A. D. 1952

No. [redacted] 84

LOUIS E. NEITZEL,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO INTERVENE FOR THE PURPOSE OF FILING BRIEF IN THE ABOVE CAUSE AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 817

LOUIS B. NETZER,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO INTERVENE FOR THE PURPOSE OF FILING BRIEFS IN THE ABOVE CAUSE AS AMICUS CURIAE.

To the Honorable, the Supreme Court of the United States.

The Brotherhood of Railroad Trainmen—a Railroad Labor Organization—by Edward B. Henslee, Sr. and Melvin L. Griffith, its attorneys in this behalf, respectfully moves the Court:

> For leave to intervene in the above cause for the purpose of filing briefs upholding the right of Louis B. Netzer and those of its members similarly situated to the benefits of The Federal Safety Appliance Acts and of The Federal Employers Liability Act in this and in other similar cases.

EDWARD B. HENSLEE, SR.,
MELVIN L. GRIFFITH,
Attorneys for The Brotherhood of Railroad Trainmen.

STATEMENT IN SUPPORT OF THE FOREGOING MOTION

The Brotherhood of Railroad Trainmen is a voluntary railroad labor organization with a membership of approximately two hundred and twenty thousand members. Included in its membership are brakemen, switchmen, conductors and other service employees.

This is a case pending in this Court involving important questions arising under The Federal Safety Appliance Acts and The Federal Employers Liability Act in which Brotherhood members are interested and upon which the highest courts of the states have reached different conclusions. The decision in the instant case is contrary to the decisions of other state courts and to principles announced by this Court which are declaratory of the intention of Congress in enacting these laws and of the interest of railroad men and of the general public in their proper administration.

The Court is respectfully requested to allow this motion for the purpose of permitting counsel for movant to file briefs in its behalf in which the questions of law involved may be argued together with their bearing upon the interests of movant's membership in this and similar cases which may arise and that of the general public therein may be presented.

Respectfully submitted,

EDWARD B. HENSLEE, SR.,
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